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Nos. 85-1301 and 85-1609

In the Supreme Court of the United States

OCTOBER TERM, 1985

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE, PETITIONER

v.

JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS

v.

THE HONORABLE JOHN C. GODBOLD,
CHIEF JUDGE OF THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which authorizes committees of Article III judges to investigate complaints against other judicial officers, violates the separation of powers doctrine by encroaching upon the independence of the judiciary.

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BRIEF FOR THE UNITED STATES IN OPPOSITION[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (85-1301 Pet. App. 1-84) is

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[1]This brief presents the views of the federal respondents in No. 85-1301 other than the five members of the Investigating Committee of the Eleventh Circuit (see note 7, *infra*), who are filing a brief on their own behalf. It presents the views of the United States in No. 85-1609; the United States intervened in the Eleventh Circuit to defend the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980.

reported at 770 F.2d 1093. The opinion of the United States District Court for the District of Columbia (85-1301 Pet. App. 85-144) is reported at 593 F. Supp. 1371. The opinion of the United States Court of Appeals for the Eleventh Circuit (85-1609 Pet. App. 1-169) is reported at 783 F.2d 1488. The order of the United States District Court for the Southern District of Florida (85-1609 Pet. App. 170-178) is reported at 610 F. Supp. 169.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 13, 1985. A petition for rehearing with suggestion of rehearing en banc was denied on November 1, 1985 (85-1301 Pet. App. 148-149). The petition for a writ of certiorari in No. 85-1301 was filed on January 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 20, 1986. The petition for a writ of certiorari in No. 85-1609 was filed on March 28, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 1651(a).

STATEMENT

1. Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 to provide a means by which the federal judiciary may exercise supervisory control over its own members. Congress believed that the new system, which in large part mirrored that previously adopted by the Judicial Conference of the United States and various circuit councils,[2] would enable Article III

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[2]See *Judicial Tenure and Discipline—1979-1980: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong, lst & 2d Sess. 63 (1979-1980) [hereinafter cited as *Judicial Tenure and Discipline*].

judges to "put their own house in order" (*Chandler* v. *Judicial Council*, 398 U.S. 74, 85 (1970)), and thereby reinforce the integrity of the judicial system.

Under the Act, any person may file a complaint with the clerk of a court of appeals, alleging that a circuit judge, a district judge, a bankruptcy judge, or a magistrate in the circuit either has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or "is unable to discharge all the duties of office by reason of mental or physical disability" (28 U.S.C. 372(c)(1)). When a complaint is received, if the chief judge of the circuit finds that the complaint is "frivolous," that it is "directly related to the merits of a decision or procedural ruling," or that the matter prompting the complaint has already been resolved, he may issue a written order terminating the proceeding (28 U.S.C. 372(c)(3)). Otherwise the chief judge is directed to empanel a special committee, composed of "himself and equal numbers of circuit and district judges of the circuit," to conduct an investigation into the matters raised in the complaint (28 U.S.C. 372(c)(4)). The committee is empowered to "conduct an investigation as extensive as it considers necessary" (28 U.S.C. 372(c)(5)), and the Act grants "full subpoena powers" to the committee (28 U.S.C. 372(c)(9)(A)). The committee is required to give notice to the judge or magistrate whose conduct is the subject of the complaint, and he or she has the right to appear before the committee in person or by counsel, present oral and documentary evidence, compel the attendance of witnesses and the production of documents, and cross-examine adverse witnesses (28 U.S.C. 372(c)(11)(B)).

After concluding its investigation, the committee is required to file with the circuit judicial council a "comprehensive written report" which is to include the committee's findings and recommendations for judicial council action

(28 U.S.C. 372(c)(5)). In turn, the judicial council if it so chooses may conduct a further investigation (28 U.S.C. 372(c)(6)(A)). The Act provides that upon consideration of the committee's report or the conclusion of any subsequent investigation, the council may censure the judge privately or publicly, may order that for a temporary period no further cases be assigned to the judge, may ask the judge to retire voluntarily, may certify the judge's disability, or may take such other action as it considers appropriate, other than removal from office (28 U.S.C. 372(c)(6)(B)). The Act specifically precludes removal from office of "any judge appointed to hold office during good behavior" (28 U.S.C. 372(c)(6)(B)(vii)), and diminution of a judge's salary is not an available sanction. If the Council determines that an Article III judge has engaged in conduct "which might constitute one or more grounds for impeachment," the council is required to certify that determination to the Judicial Conference (28 U.S.C. 372(c)(7)(A)-(B)). The judicial council must provide notice of its decision to both the complainant and the judicial official (28 U.S.C. 372(c)(6)(C)), both of whom are entitled to petition the Judicial Conference for review (28 U.S.C. 372(c)(10)).[3]

Like the council, the Judicial Conference is empowered to conduct an additional investigation.[4] The Conference is authorized to impose the sanctions authorized in 28 U.S.C. 372(c)(6)(B) (28 U.S.C. 372(c)(8)). If the Conference "concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be

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[3]The judicial council may in its discretion refer any complaint to the Judicial Conference at an earlier stage of the council's deliberations.

[4]The Judicial Conference is authorized by 28 U.S.C. 331 to exercise the authority provided in 28 U.S.C. 372(c) through a Standing Committee. The Conference has established a Committee to Review Circuit Council Conduct and Disability Orders to exercise its responsibilities to review council orders issued under 28 U.S.C. 372(c)(6).

warranted, it shall so certify and transmit the determination and record of proceedings to the House of Representatives" (*ibid.*).

2. Two district court judges filed a complaint under 28 U.S.C. 372(c) against petitioner, a United States District Judge for the Southern District of Florida, in March 1983.[5] The complaint alleged that petitioner had engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts and had violated several canons of the Code of Judicial Conduct. Its specific allegations referred both to conduct charged in an indictment filed in 1981, on which petitioner was acquitted, and to other conduct and to statements by petitioner in the course of the criminal proceedings.[6]

Pursuant to Section 372(c)(4) of the Act, the Honorable John C. Godbold, Chief Judge of the Eleventh Circuit, issued an order appointing, in addition to himself, four other judges to a committee to investigate the allegations in the complaint.[7] The committee appointed an attorney in private practice to serve as its lead investigator and obtained access to the materials of the grand jury which had indicted petitioner (see *In re Petition to Inspect & Copy Grand Jury Materials*, 735 F.2d 1261 (11th Cir. 1984), cert. denied, No. 85-1189 (Oct. 9, 1984)).

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[5]We refer to Judge Hastings as "petitioner" in this brief. He is the sole petitioner in No. 85-1301 and the lead petitioner in No. 85-1609.

[6]The indictment charged petitioner with conspiring with an attorney to obtain a bribe (see *United States* v. *Hastings*, 681 F.2d 706 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983) (holding that the Impeachment Clause does not bar indictment of a sitting federal judge)).

[7]In addition to Chief Judge Godbold, the four other judges on the Investigating Committee include two district court judges, Sam C. Pointer and William C. O'Kelley, and two circuit court judges, Gerald Bard Tjoflat and Frank M. Johnson.

3. Petitioner brought suit in the United States District Court for the District of Columbia in December 1983 to enjoin the committee from proceeding with its investigation. He alleged inter alia that the Act, by authorizing the judicial councils to investigate and discipline individual judges, violated the separation of powers doctrine and that the Act on its face violated due process guarantees. The district court rejected petitioner's claims (85-1301 Pet. App. 85-144). It held, contrary to the contention of the government defendants, that the commencement of the investigation made these issues sufficiently concrete to present a justiciable controversy (*id.* at 112-114). With respect to the separation of powers challenge, the court held that the Act posed no threat to the independence of the judiciary. It reasoned that "the Framers never intended that the independence of any officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government" (*id.* at 117). The court held that the Act on its face provided ample assurance of due process (*id.* at 136-140).

The court of appeals affirmed the district court's dismissal of petitioner's constitutional challenges, but it did so on ripeness grounds (85-1301 Pet. App. 1-84). Because the committee appointed by Chief Judge Godbold had not completed its investigation, the court said, "[a]nything might happen in the proceedings initiated against appellant, from early dismissal to a recommendation of impeachment. Of the powers the Act vests in the judicial administrative organs, few, some, or many may be invoked against appellant" (*id.* at 32). To avoid determining constitutional issues " 'in broader terms than are required by the precise facts to which the ruling is to be applied,' " (*ibid.*, quoting *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U.S. 549, 569 (1947)), the court declined to adjudicate petitioner's

constitutional claims.[8] The court added that petitioner "has available his constitutional challenge to the validity of the Act in every one of the situations in which he is exposed to the threat of injury. Thus, he may interpose his constitutional arguments, *e.g.*, as a defense to a subpoena" (85-1301 Pet. App. 40).[9] The court of appeals subsequently denied petitioner's petition for rehearing en banc without dissent (*id.* at 148).

4. Prior to the decision of the District of Columbia Circuit, the committee had directed that subpoenas be served on petitioner's secretary and on one of his then current and several of his former law clerks. In May 1985, petitioner, his secretary, and one of his former law clerks filed a complaint in May 1985 in the United States District Court for the Southern District of Florida seeking, inter alia, to restrain the enforcement of the subpoenas. The district court dismissed the action on jurisdictional grounds, ruling that only the court of appeals had authority to enforce or invalidate the subpoenas (85-1609 Pet. App. 170-178), and plaintiffs filed a notice of appeal in the Eleventh Circuit. Meanwhile, the committee filed a motion in the Eleventh Circuit for enforcement of the subpoenas, and the two cases were consolidated. The subpoenaed witnesses, two of whom were represented by the same counsel as Judge Hastings, defended against the motion to enforce the subpoenas on

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[8]The court bolstered its conclusion that petitioner's constitutional claims were not ripe by relying on the policy against "rendering judgment on the constitutionality of proceedings *while* the proceedings themselves are going on. * * * [T]he councils and Conference are entitled to a measure of comity sufficient to preclude disruptive injunctive relief by federal courts absent a showing that serious and irremediable injury will otherwise result" (85-1301 Pet. App. 38-39 (emphasis in original)).

[9]Judge Edwards concurred in the judgment, but wrote separately to address what in his view were the substantial constitutional questions raised by the Act.

the ground, among others, that the Judicial Councils Reform and Judicial Conduct and Disability Act violated the separation of powers. The court of appeals notified the United States that the constitutionality of an act of Congress had been drawn into question and the United States intervened in the action.

The Eleventh Circuit panel, comprised of three judges from other circuits because of the recusal of all active judges in the Eleventh Circuit, first ruled that the prospective witnesses had standing to challenge those provisions of the Act "going to the existence and investigatory authority of the Committee" (85-1609 Pet. App. 54). The court noted that the prospective witnesses "were members of Judge Hastings' chambers staff; in declining to testify as to communications between themselves and Judge Hastings, they are invoking a privilege held by Judge Hastings himself" (*id.* at 51 (footnote omitted)). The court concluded that "[i]t seems only reasonable that we should decide whether the very existence of the Committee for its assigned purpose violates the Constitution, before allowing the Committee to intrude upon confidential communications between the judge and his staff" (*id.* at 52).

On the merits, the Eleventh Circuit rejected the subpoenaed individuals' claim that the Act improperly assigned executive functions to Article III judges. It noted that "the investigatory tasks at issue here, including the subpoena power, have the * * * ultimate aim of promoting 'the effective and expeditious administration of the business of the courts,' " and thus could not be considered executive in nature (85-1609 Pet. App. 71-72). The court next ruled that provision of procedures by which Article III judges may investigate complaints against other judicial officers is consistent with the separation of powers. It stated that "a credible internal complaint procedure can be viewed as essential to maintaining the institutional independence of

the courts" (*id.* at 82). The court continued that "while the Act may impose some pressures upon judges' independence, the fact that it places the investigation, and the determination of what actions to take, entirely within the hands of judicial colleagues makes it likely that the rightful independence of the complained-against judge, especially in the area of decision-making, will be accorded maximum respect" (*id.* at 83-84 (footnote omitted)). The court held that several of the possible outcomes of the proceedings, including some of the possible sanctions, "seem unobjectionable" (*id.* at 88). However, it left consideration of the propriety of two of the remedial options open to the judicial councils—forbidding assignment of cases to judges on a temporary basis and issuing a public reprimand—to a case in which they could be assessed in a concrete setting (*id.* at 85-96).[10] Finally, the court held that communications between a judge and his law clerks are subject to a qualified privilege, which it found overridden in this case by the committee's need for certain testimony to further its investigation (*id.* at 131-166).

The mandate of the Eleventh Circuit was stayed pending the filing of a petition for a writ of certiorari. The Eleventh Circuit denied the committee's motion to vacate the stay on May 2 and this Court denied the committee's motion to vacate the stay on May 19. Thus three years after the complaint was filed the investigation has not been completed and is not proceeding.

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[10]The Eleventh Circuit concluded that petitioner's due process arguments were not ripe (85-1609 Pet. App. 111-115). It nonetheless noted "that the provisions of section 372(c)(11)(B) of the Act—providing that the judge under investigation shall be afforded the opportunity to appear before the Committee, present evidence, compel the attendance of witnesses and the production of documents, cross-examine witnesses, and present argument—appear to undercut appellants' substantive argument" (*id.* at 113-114). The court similarly stated that petitioner's other due process challenge—to the combination of investigatory and adjudicatory functions in the Investigating Committee—"fares no better" (*id.* at 114).

ARGUMENT

Petitioner contends (85-1301 Pet. i (Question 2); 85-1609 Pet. i (Question 3)) that the Judicial Councils Reform and Judicial Conduct and Disability Act violates the doctrine of separation of powers.[11] The core of petitioner's argument is that the establishment of procedures by which Article III judges review complaints against other judicial officers undermines the independence of the judiciary. The Eleventh Circuit carefully considered this claim in light of this Court's decisions in *Chandler* v. *Judicial Council*, 398 U.S. 74, 85 (1970). It ruled that the Act's "complaint procedure

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[11] Petitioner also argues in his petition in No. 85-1301, which was filed before the Eleventh Circuit issued its decision, that the District of Columbia Circuit erred in refusing on ripeness grounds to address his challenge to the constitutionality of the Act (Questions 1 and 3). Petitioner argued that the District of Columbia Circuit should have considered his separation of powers argument lest it "be lost amidst a morass of collateral issues" in the Eleventh Circuit (85-1301 Pet. 38). Petitioner's concerns in that regard proved unfounded when the Eleventh Circuit carefully considered his separation of powers argument. Since the Eleventh Circuit has now considered that argument, petitioner's contention that the District of Columbia Circuit erred in declining to consider it is of no continuing importance.

Petitioner also appears to raise his due process argument in his petition in No. 85-1301 (Question 4), although he does not raise that issue in his petition in No. 85-1609. This issue clearly is not ripe for review, as both the District of Columbia and Eleventh Circuits concluded. Moreover, it is clear that the Act provides ample due process guarantees, as both the Eleventh Circuit and the United States District Court for the District of Columbia concluded.

Petitioner makes two contentions in his petition in No. 85-1609 in addition to his separation of powers argument. One concerns which court reviews questions arising from the issuance of subpoenas under 28 U.S.C. 332(d)(1) (Question 1) and the other concerns the privilege protecting communications within a judge's chambers (Question 2). The United States, which intervened in the Eleventh Circuit to defend the constitutionality of the Act, will not discuss those issues at this time; we are advised that counsel for the other respondents in No. 85-1609 will address them.

of which this investigation is a part is, in broad outline, reasonable and not overly threatening to judicial independence" (85-1609 Pet. App. 80)[12] because it neither impedes discharge of the judiciary's core task of adjudicating cases and controversies nor allows a sister branch to encroach upon the powers reserved to the judiciary (*id.* at 74-95). We believe that the decision of the Eleventh Circuit on this issue was correct and that review by this Court is not warranted in the absence of a conflict in the circuits.

In *Chandler* the Court sanctioned the creation and operation of the circuit judicial councils under the Administrative Office Act of 1939. While the Court did not reach the merits of Judge Chandler's claim that a council could not remove cases from his docket, the Court stated that "[w]e see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within [each] circuit' " (398 U.S. at 86 n.7 (citation omitted)).[13] The Court further noted that "if one judge in any system refuses to abide by such reasonable procedures [set

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[12]The court found it necessary to judge the procedure only "in broad outline" because the only ripe issue was whether the Act constitutionally authorized the investigation and the issuance of the subpoenas.

[13]That statement disposes of petitioner's argument that the Act is unconstitutional because it assigns executive powers to judicial officers. As the Court recognized in *Chandler* (398 U.S. at 86 n.7) the judicial councils exercise administrative responsibilities in the interest of their own branch, not as part of the executive branch. Thus the question whether judges may perform nonadjudicatory functions at the behest of another branch is not raised, as the Eleventh Circuit concluded (85-1609 Pet. App. 62-74).

by the judicial councils] it can hardly be that the extraordinary machinery of impeachment is the only recourse" (*id.* at 85; see also *id.* at 96-103 (Harlan, J., concurring)).[14]

In enacting the Judicial Councils Reform and Judicial Conduct and Disability Act, Congress responded to this Court's suggestion in *Chandler* (398 U.S. at 86 n.7) that it clarify and formalize the judiciary's authority to make "all necessary orders for the effective and expeditious administration of the business of the courts." As the Judicial Conference resolved prior to enactment of the bill, "legislation placing authority in the judicial branch itself is both compatible with long-standing concepts of separation of powers and desirable in terms of maintaining the ultimate objective of an independent judiciary worthy of public confidence" (*Judicial Tenure and Discipline, supra*, at 67). The Eleventh Circuit agreed, finding that "[t]he judiciary as a whole, including the colleagues of complained-against judges, has an interest in seeing that nonfrivolous complaints are looked into, to the end that the judge, and the system he exemplifies, be exonerated or, if not, that the public perceive that the system has undertaken to police itself" (85-1609 Pet. App. 81). Indeed, the court noted that without such judicial machinery, "pressures from the public and legislature might result in withdrawal of needed financial support or in the creation of investigatory mechanisms outside the judicial branch which, to a greater degree than

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[14]Indeed, the judiciary has long been empowered by Congress to "make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States" (Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 83; see *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825)). Establishment of the Judicial Conference and the judicial councils in effect codified and made uniform what had previously been the practice in most circuits. See Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203 (1970).

the Act, would threaten judicial independence" (*id.* at 82-83).[15]

But while the Act allows the judiciary to "put [its] own house in order," it does not sanction interference with the consideration of individual cases. To prevent this, all complaints that are "directly related to the merits of a decision or procedural ruling" must be dismissed (28 U.S.C. 372(c)(3)) so that the administrative process cannot be used as an alternative to appeal, or to influence any decision in a pending case. Thus the establishment of this peer review mechanism does not intrude upon each judge's primary function " 'to say what the law is' " (*United States* v. *Nixon*, 418 U.S. 683, 703 (1974), quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), or interfere with the adjudicative process.[16]

Most important, whatever action is taken—exoneration of the judge, censure, other administrative action, or certification of the record to the House—remains within the discretion of the judicial branch. The Act does not allow a coordinate branch to participate in any way in the review process. If one starts from the *Chandler* premise that there must be some mechanism, short of impeachment, to discipline judges who engage in conduct that their peers deem

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[15]Petitioner suggests (85-1609 Pet. 25-27) that, while it is apparent that some body must be able to consider complaints against federal judges, it does not follow that that tribunal must have investigative powers. That contention obviously lacks merit, since no meaningful consideration could be accorded complaints without the power to investigate them.

[16]Petitioner suggests (85-1609 Pet. 30-31) that the pendency of an investigation may make a judge less "fearless and unbeholden" and may be perceived by litigants as affecting the impartiality of a court reviewing the judge's decisions. We do not think these speculative arguments are consistent with the rationale of *Chandler*.

prejudicial to the " 'effective and expeditious administration of the business of the courts' " (398 U.S. at 86 n.7 (citation omitted)) surely the best mechanism is one supervised by the judiciary itself. The Eleventh Circuit reached the common sense conclusion that "far more serious separation of powers objections would have arisen had these same powers been conferred upon a permanent agency in the executive (or legislative) branch" (85-1609 Pet. App. 73-74 (footnote omitted)).[17] Finally, we emphasize, as did the Eleventh Circuit (*id.* at 80) that the only separation of powers issue decided below is whether the Act "facially and in broad design, is constitutional in respect to authorizing the current investigation, so that the subpoenas may be enforced with confidence that the Committee's investigatory proceedings are legitimate." That issue was correctly resolved below. Other issues that may arise during or after the committee's long-delayed investigation can wait for another day.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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MAY 1986

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[17]Cf. *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 444 (1977) ("it is clearly less intrusive to place custody and screening of the materials within the Executive Branch itself than to have Congress or some outside agency perform the screening function").